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Attorneys for Defendant **Peña Andrade**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE BARRY T. MOSKOWITZ)

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESUS PEÑA ANDRADE,
Defendant

Criminal No. 08-CR-1967-BTM

Date: July 25, 2008

Time: 1:30 p.m.

**DEFENDANT'S NOTICE OF
MOTIONS AND MOTIONS TO:
1) COMPEL DISCOVERY; AND
2) GRANT LEAVE TO FILE FURTHER
MOTIONS**

TO: KAREN HEWITT, UNITED STATES ATTORNEY, and
LUELLA M. CALDITO, ASSISTANT UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on Friday, July 25, 2008 at 1:30 p.m., or as soon thereafter
as counsel may be heard, the defendant, Jesus Peña Andrade, by and through his
counsel, Debra Ann DiIorio and the Law Offices of DiIorio & Hall, APC, will move this Court
to 1) compel discovery; and 2) grant leave to file further motions.

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MOTIONS

The defendant, Jesus Peña Andrade, by and through his counsel, Debra Ann DiIorio and the Law Offices of DiIorio & Hall, APC, pursuant to Fed. R. Crim. P. 12, 14, 16 and 26.2; Title 18, United States Code Sections 3500-01 and 3504, and the Fifth and Sixth Amendments to the United States Constitution, hereby moves this Court to 1) compel discovery; 2) and grant leave to file further motions.

These motions are based upon the instant motions, the notice of motions, the attached statement of facts and memorandum of points and authorities, the files and records in the above-entitled cause, and any and all other information that may be brought to the Court's attention prior to or during the hearing on these motions.

Respectfully submitted,

Dated: July 11, 2008

/s/Debra A. DiIorio
DEBRA A. DIIORIO
DiIORIO & HALL, APC
Attorney for Defendant **Peña Andrade**

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. BARRY T. MOSKOWITZ)

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v.

JESUS PEÑA ANDRADE,

Defendant,

Criminal No. 08-CR-1967-BTM

Date: July 25, 2008

Time: 1:30 p.m.

**STATEMENT OF FACTS AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTIONS**

I.

STATEMENT OF FACTS

The following statement of facts is based, in part, on materials received from the government in discovery on July 9, 2008. The government has produced 244 pages of discovery and one DVD. The facts alleged in these motions, therefore, are subject to amplification and/or modification at a future motion hearing; Mr. Peña Andrade reserves the right to take a contrary position at any future hearing as these facts are in no way intended by him as admissions.

On May 11, 2008, Border Patrol Agents were conducting linewatch duties in a remote area to the east of the Calexico, California Port of Entry. Agents saw signs of foot traffic and followed the signs to an area near the south canal bank of the All American Canal. They then saw a man walking eastbound along the south canal bank.

One of the agents approached the man, later identified as Juan Peña Andrade, and questioned him about his immigration status. Mr. Peña replied that he lived just south of the Canal and was merely out walking. He admitted he had no immigration documents to legally

1 enter or remain in the United States. During subsequent records checks at the Calexico Border
2 Patrol Station, Mr. Peña was found to be a citizen of Mexico who was ordered deported by an
3 Immigration Judge on November 14, 1996 and was physically removed from the United States
4 on March 11, 1998 and January 7, 2003.

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6 **II.**

7 **MOTION TO COMPEL DISCOVERY**

8 Mr. Peña Andrade requests the following discovery pursuant to Fed. R. Crim. P. 12(b)(4)
9 and 16:

10 (1) all written and oral statements made by him. This request includes, but is not limited
11 to, any rough notes, records, reports, transcripts or other documents in which statements of Mr.
12 Peña Andrade is contained. It also includes the substance of any oral statements, regardless of
13 whether the government intends to introduce such statements at trial. These are all discoverable
14 under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). Mr. Peña
15 Andrade also requests any response to any Miranda warnings which may have been given to him.
16 See United States v. McElroy, 697 F.2d 459 (2d Cir. 1982);

17 (2) all documents, statements, agents' reports, and tangible evidence favorable to Mr.
18 Torres on the issue of **guilt or punishment** and/or which affects the credibility of the
19 government's case. This evidence must be produced pursuant to Brady v. Maryland, 373 U.S.
20 83, 87 (1963), and United States v. Agurs, 427 U.S. 97 (1976);

21 (3) all evidence, documents, records of judgments and convictions, photographs and
22 tangible evidence, and information pertaining to any prior arrests and convictions or prior bad
23 acts. Evidence of prior record is available under Fed. R. Crim. P. 16(a)(1)(B). Evidence of prior
24 similar acts is discoverable under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609.
25 Mr. Peña Andrade specifically requests reasonable notice pursuant to Fed. R. Evid 404(b) of at
26 least four weeks prior to trial, of any evidence the government intends to introduce at trial under
27 this rule;

1 (4) all evidence seized as a result of any search, either warrantless or with a warrant, in
2 this case. Mr. Peña Andrade specifically requests copies of all documents and evidence seized
3 from him, and requests copies of all documents, evidence and physical items seized from the
4 vehicle, as well as photographs, fingerprints, videotapes or recordings made in this case. This
5 is available under Fed. R. Crim. P. 16(a)(1)(C);

6 (5) all arrest reports, investigator's notes, memos from arresting officers, sworn
7 statements and prosecution reports pertaining to Mr. Peña Andrade. These are available under
8 Fed. R. Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(I);

9 (6) the personnel file of the interviewing agent(s) containing any complaints of assaults,
10 abuse of discretion and authority and/or false arrest. Pitchess v. Superior Court, 11 Cal. 3d. 531,
11 539 (1974). In addition, the defense requests that the government examine the personnel files
12 of all testifying agents, and turn over Brady and Giglio material reasonably in advance of trial
13 Kyles v. Whitley, 115 S.Ct. 1555 (1995); United States v. Henthorn, 931 F.2d 29, 30-31 (9th Cir.
14 1991). If the prosecutor is unsure as to whether the files contain Brady or Giglio material, the
15 files should be submitted to the Court, in camera. Id. The prosecution should bear in mind that
16 there exists an affirmative duty on the part of the government to examine the files. Id.

17 (7) Mr. Peña Andrade requests copies of any and all audio/video tape recordings made
18 by the agents in this case and any and all transcripts, including taped recordings of any
19 conversations of any of the agents involved in this case. This evidence is available under Fed.
20 R. Crim. P. 16(a)(1)(C);

21 (8) Mr. Peña Andrade requests the name and last known business address of each
22 prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987);
23 United States v. Tucker, 716 F.2d 583 (9th Cir. 1983) (failure to interview government witnesses
24 by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense
25 has equal right to talk to witnesses).

26 (9) all other documents and tangible objects, including photographs, books, papers,
27 documents, photographs, or building or places or copies of portions thereof which are material
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1 to Mr. Peña Andrade' defense or intended for use in the government's case-in-chief or were
2 obtained from or belong to Mr. Peña Andrade. Rule 16(a)(1)(C);

3 (10) all results or reports of scientific tests or experiments, or copies of which are within
4 the possession, control, or custody of the government or which are known or become known to
5 the attorney for the government, that are material to the preparation of the defense, including the
6 opinions, analysis and conclusions of experts consulted by law enforcement including finger
7 print specialists in the instant case. These must be disclosed, once a request is made, even
8 though obtained by the government later, pursuant to Fed.R.Crim.Pro. 16(a)(1)(D).

9 (11) any express or implicit promise, understanding, offer of immunity, of past, present,
10 or future compensation, agreement to execute a voluntary return rather than deportation or any
11 other kind of agreement or understanding between any prospective government witness and the
12 government (federal, state and local), including any implicit understanding relating to criminal
13 or civil income tax liability. United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986); United
14 States v. Risken, 788 F. 2d 1361 (8th Cir. 1986); United States v. Luc Levasseur, 826 F.2d 158
15 (1st Cir. 1987);

16 (12) any discussion with a potential witness about or advice concerning any contemplated
17 prosecution, or any possible plea bargain, even if no bargain was made, or the advice not
18 followed. Brown v. Duggen, 831 F.2d 1546, 1558 (11th Cir. 1986) (evidence that witness
19 sought plea bargain is to be disclosed, even if no deal struck); Haber v. Wainwright, 756 F.2d
20 1520, 1524 (11th Cir. 1985);

21 (13) any evidence that any prospective government witness has engaged in any criminal
22 act whether or not resulting in a conviction. See Rule 608(b), Federal Rules of Evidence and
23 Brady;

24 (14) any evidence that any prospective witness is under investigation by federal, state or
25 local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir.), cert.
26 denied, 474 U.S. 945 (1985); and,

27 (15) any evidence, including any medical or psychiatric report or evaluation, tending to
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1 show that any prospective witness's ability to perceive, remember, communicate, or tell the truth
2 is impaired; and any evidence that a witness has ever used narcotics or other controlled
3 substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir. July
4 11, 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980);

5 (16) the name and last known business address of every witness to the crime or crimes
6 charged (or any of the overt acts committed in furtherance thereof) who will not be called as a
7 government witness. United States v. Cadet, 727 F.2d 1469 (9th Cir. 1984);

8 (17) the name and last known business address of each prospective government witness.
9 See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States v. Tucker, 716 F.2d
10 583 (9th Cir. 1983) (failure to interview government witnesses by counsel is ineffective); United
11 States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to
12 witnesses);

13 (18) the name of any witness who made an arguably favorable statement concerning the
14 defendant or who could not identify him or who was unsure of his identity, or participation in
15 the crime charged. Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North
16 Carolina, 637 F.2d 213, 223 (4th Cir. 1980); James v. Jago, 575 F.2d 1164, 1168 (6th Cir. 1978);
17 Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1975);

18 (19) Mr. Peña Andrade requests a transcript of the grand jury testimony and rough notes
19 of all witnesses expected to testify at the motion hearing or at trial. This evidence is
20 discoverable under Fed. R. Crim. P. 12(I) and 26 and will be requested.

21 (20) Jencks Act Material. The defense requests all material to which defendant is entitled
22 pursuant to the Jencks Act, 18 U.S.C. § 3500, reasonably in advance of trial, including dispatch
23 tapes. A verbal acknowledgment that "rough" notes constitute an accurate account of the
24 witness' interview is sufficient for the report or notes to qualify as a statement under §3500(e)(1).
25 Campbell v. United States, 373 U.S. 487, 490-92 (1963). In United States v. Boshell, 952 F.2d
26 1101 (9th Cir. 1991), the Ninth Circuit held that when an agent goes over interview notes with
27 the subject of the interview the notes are then subject to the Jencks Act. The defense requests
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1 pre-trial production of Jencks material to expedite cross-examination and to avoid lengthy
2 recesses during the pre-trial motions hearings or trial.

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4 **III.**

5 **JESUS PEÑA ANDRADE REQUESTS THAT THE COURT GRANT**
6 **LEAVE TO FILE FURTHER MOTIONS**

7 Mr. Peña Andrade requests this Court to grant him leave to file further motions
8 after complete discovery has been provided and reviewed by the defense.

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10 **IV.**

11 **CONCLUSION**

12 For the foregoing reasons, Mr. Peña Andrade requests that this Court grant the motions
13 stated herein.

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15 Respectfully submitted,

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18 Dated: July 11, 2008

19 /s/ Debra A. DiIorio
20 **DEBRA A. DiIORIO**
21 DiIORIO & HALL, APC
22 Attorney for Defendant **Peña Andrade**
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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA
3 **(HONORABLE BARRY T. MOSKOWITZ)**

4 UNITED STATES OF AMERICA,) Criminal No. **08-CR-1967-BTM**
5 Plaintiff,)
6 v.)
7 **JUAN PEÑA ANDRADE,**)
8 Defendant,) **PROOF OF SERVICE**
9 _____)

10 I, the undersigned, say:

11 1. I am over eighteen years of age, a resident of the County of San Diego, State
12 of California, and not a party to the within action;

13 2. My business address is 964 Fifth Ave., Suite 214, San Diego, California
14 92101;

15 3. I served the within **MOTION TO COMPEL DISCOVERY, AND FOR LEAVE TO
16 FILE FURTHER MOTIONS** on opposing counsel by e-filing through the CM/ECF system;

17 I certify under penalty of perjury that the foregoing is true and correct. Executed on
18 July 11, 2008, at San Diego, California.

19 /s/ Debra A. Dilorio
20 Debra A. Dilorio
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